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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1047.~~ 709

THE AMERICAN BIBLE SOCIETY AND THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH OF THE UNITED STATES OF AMERICA, APPELLANTS,

VS.

MARY PRICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 12, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 1047.

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INDEX.

	Original.	Print.
Placita	1	1
Record from Saint Clair County circuit court	2	1
Bill	3	1
Summons	10	4
Answer	12	5
Petition for removal to United States circuit court	16	6
Bond on removal	20	8
Answer of Rebecca Foreman	23	9
Order in Saint Clair circuit court denying petition for removal	24	9
Certificate of clerk circuit court Saint Clair County	24	9
Order in circuit court United States taking jurisdiction	26	10
Order in circuit court United States overruling motion to remand	27	11
Motion in circuit court United States for rehearing motion to remand	28	11
Decree	29	12
Order allowing appeal	30	12
Appeal bond	31	12
Certificate	33	13

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the honorable John M. Harlan, one of the justices of the Supreme Court of the United States, presiding judge, and honorable Samuel H. Treat, district judge of said district, associate judge, on Tuesday, the twentieth day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and sixth year.

J. A. JONES, *Clerk.*

MARY PRICE
vs.
REBECCA FOREMAN, JOHN J. THOMAS, FREDERICK H. Pieper, Theophilus Harrison, American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America.
} In chancery.

2 SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty, came the defendants the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, by Messrs. George P. Strong and J. B. Hay, their solicitors, and filed in the clerk's office of said court a certified record of papers filed and proceedings thereon had in the circuit court of St. Clair County, Illinois, which said certified record is in the words and figures following, to wit:

RECORD FROM ST. CLAIR CO. CIRCUIT COURT.

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the circuit court within and for the county of St. Clair and State of Illinois, begun and held at the court-house, in the city of Belleville, in said county of St. Clair, on Monday, the 20th day of September, A. D. 1880, it being the 3rd Monday of September, A. D. 1880, according to the act of the general assembly, by the Hon. William
3 H. Snyder, one of the judges of the third judicial court of the State of Illinois, of which the said county of St. Clair forms a part, the said court sitting as a court of chancery, the following proceedings were had, to wit:

Present, honorable William H. Snyder, judge; Herman G. Weber, sheriff; George W. Brockhaus, State's attorney; Charles Becker, clerk.

Be it remembered that, on the 18th day of November, 1878, the following bill was filed and refiled on the 28th day of July, 1879, to wit:

Bill.

To the January term, A. D. 1879, circuit court. Chancery.

STATE OF ILLINOIS,
St. Clair County, ss:

To the honorable the circuit court of St. Clair County, in chancery sitting:

Humbly complaining showeth unto your honor, your oratrix, Mary Price, of the county of St. Clair, that one Isaac Foreman, late of said county, departed this life on the 28th day of October, A. D. 1878, leaving a widow, Rebecca Foreman, and your oratrix his only child and heir at law, and being seized and possessed of real and personal property to a large amount, estimated at two hundred thousand dollars ($200,000.00).

4 2nd. Your orator further showeth that after the death of the said Isaac Foreman there was filed in the office of the county clerk of said St. Clair County on the 4th day of November, A. D. 1878, a certain instrument in writing, purporting and pretending to be the last will and testament of the said Isaac Foreman, deceased, dated the 28th day July, A. D. 1874, by which said pretended will it is provided as follows:

"I, Isaac Foreman, of the county of St. Clair and State of Illinois, conscious of the uncertainty of human life and being desirous while in health and of sound mind and memory of making a disposition of my entire estate at the time of my death, do make this my last will and testament as follows:

"1st. I will and devise to my beloved wife Rebecca the homestead where I now reside, being the east half of section No. twenty-two (22) in township No. two (2) north, of range No. eight (8) west, in St. Clair County aforesaid, reserving and excepting from this bequest that portion of the above half section which has been laid out and platted as a town, called the
Town of Forman, comprising about forty acres of land, as appears
5 of record in the recorder's office of St. Clair County, Illinois, to
hold, occupy, use, and enjoy the said land during her natural life, and at her death to be disposed of as hereinafter mentioned. I also give and bequeath to my said wife forever all my household and kitchen furniture, beds and bedding, and all the stock on said homestead and farming utensils belonging to the same.

"2nd. I do hereby appoint John J. Thomas, Frederick H. Pieper, and Theopilus Harrison, all of Belleville, St. Clair County, Illinois, as executors of this my last will and testament, and trustees for the purposes hereinafter stated.

"3rd. I direct and empower my said executors to sell and convey at public or private sale, and on such terms as they may think best, the whole of my real and personal estate not hereinbefore devised, and to convert the same into money.

"4th. After the payment of all my just debts, I give and bequeath to my said executors the sum of two thousand dollars ($2,000.00), in trust
for the use and benefit of my daughter, Mary Price, during her
6 natural life. I desire my said executors to safely loan or invest
said sum of money and pay to my said daughter the interest or profits thereof annually during her life, and after her death the proceeds or interest thereof to be paid annually for the maintenance and education

of her child or children and such principal sum to be paid to her child or children when he, she, or they become of age. And should my said daughter die leaving no child or children, or should all of them die before coming of age, then the said sum of two thousand dollars shall be payable by my said executors two-thirds thereof to the American Bible Society and one-third thereof to the Missionary Society of the Methodist Episcopal Church of the United States of America.

"5th. I give and bequeath the proceeds in money of all the real and personal estate not hereinbefore specifically devised as follows: Two-thirds (⅔) thereof to the American Bible Society and one-third (⅓) thereof to the Missionary Society of the Methodist Episcopal Church of the United States, to be paid by my said executors to the aforesaid societies within a reasonable time after they shall have sold land or personal estate.
7 After the death of my said wife, Rebecca, I authorize and empower my said executors to sell and convey the said real estate so devised to her for the term of her natural life with as full powers as are granted for the conveyance of my other property herein, and I give and bequeath the proceeds of the sale of said land in like manner, to wit, two-thirds thereof to the American Bible Society and one-third thereof to the Missionary Society of the Methodist Episcopal Church of the United States of America.

"In witness whereof I have hereunto set my hand and seal this twenty-eighth day of July, A. D. 1874.

"ISAAC FORMANN. [SEAL.]

"Signed, sealed, published, and declared by the said Isaac Forman as and for his last will and testament, in presence of us, who, in his presence and in the presence of each other, and at his request, have subscribed our names as witnesses thereto.

"THEOD. J. KRAFFT,
"LOUIS P. KRAFFT,
"*Witnesses.*"

Your orator further showeth to this honorable court that such proceedings were had in the county court of said county on the 4th day
8 of November, A. D. 1878, that the said pretended instrument was probated and declared to be the last will and testament of the said Isaac Foreman, deceased, and that letters testamentary were granted by said court to the said John J. Thomas, Frederick H. Pieper, and Theophilus Harrison, as executors of said pretended last will and of the estate of said Isaac Foreman, deceased, and that owing to the fact that one of said executors, Frederick H. Pieper, at the time said pretended will was filed, was judge of the county court, the said will and proceedings in the county court were certified to the circuit court of St. Clair County and filed in said court, and that on the 17th day of November, 1878, the said pretended will was probated in said circuit court and ordered to be recorded, and that said will be filed in the county court, of all of which proceedings your oratrix had no notice whatever.

Your oratrix further showeth unto this honorable court that the said Isaac Foremann, at the time when said pretended will is supposed to have been signed by him, was of a very advanced age, to wit, seventy-four years of age, and that his mind had become greatly impaired by age, and

9 that he had become, and was at that time, and had remained to the time of his death, of unsound mind and memory.

Your oratrix also charges that owing to his impaired mind, and also to his highly excited feelings in all matters belonging to religious subjects, he was very liable to be unduly influenced by others, and that his mind had been, when not yet entirely impaired, purposely directed and unduly influenced by designing persons to make such a disposition of his property as he actually did in this instrument of writing, so that although his mind had become so impaired so as to incapacitate him to make a will, this idea of making these bequests to wealthy corporations and leaving his nearest kin unprovided for remained fixed in his mind.

Your oratrix distinctly charges that the said pretended will is null and void for the reason heretofore stated, and contests the validity of said will as provided by law.

Your oratrix prays that a summons in chancery may issue, commanding the said Rebecca Foreman and the said John J. Thomas, Frederick
10 H. Pieper, Theophilus Harrison, and also the said American Bible
Society and the Missionary Society of the Methodist Episcopal Church of the United States of America to be and appear at the next term of this court, and they be required to answer this bill not under oath, and that if the allegations of this bill be denied an issue at law be made whether the said writing produced be the will of said Isaac Foreman or not, to be tried by a jury as provided by law, and that upon a hearing such decree be made as the case requires, and, as in duty bound, your oratrix will ever pray, &c.

SPENCER M. CASE,
G. & G. A. KOERNER,
Complainant's Sol's.

Be it remembered that on the 19th day of November, 1878, the following summons was issued, to wit;

Summons.

STATE OF ILLINOIS,
St. Clair County, sct:

The people of the State of Illinois to the sheriff of St. Clair County, greeting:

We command you to summon Rebecca Foreman, John J. Thomas, Frederick H. Pieper, Theophilus Harrison, American Bible So-
11 ciety, and the Missionary Society of the Methodist Episcopal
Church of the United States of America, if they can be found in your county, to be and appear in the St. Clair County circuit court on the first day of the next term thereof, to be holden at the court-house, in the city of Belleville, in said county of St. Clair, on the first Monday of January, 1879, then and there in said court of chancery sitting to answer the bill of complaint exhibited against them by Mary Price to set aside will, and not to fail under penalty of what the law directs. And this writ you shall have at our said court, with your return endorsed thereon.

Witness Charles Becker, clerk of the circuit court, and the seal thereof hereunto affixed, at office, this 19th day of November, A. D. one thousand eight hundred and seventy-eight.

CHARLES BECKER *Clerk*,
By GEO. W. SCHUESSLER, *Deputy*.

Endorsements.

I hereby enter the appearance of Mrs. Rebecca Foreman in said cause, and waive service of process on her.

MARSHALL W. WEIR,
Her Solicitor.

12 STATE OF ILLINOIS,
St. Clair County:

I have duly served the within summons by reading and also delivering a true copy of the same to the within-named John J. Thomas, Frederick H. Pieper, and Theophilus Harrison, December 3, 1878, said American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America not found, as I am therein commanded.

H. G. WEBER, *Sheriff*,
By BEN BONEAU, *D'p'ty*.

Be it remembered that on the 14th day of January, 1879, the following answer was filed and refiled on the 28th day of July, 1879, to wit:

Answer.

In circuit court to the January term, A. D. 1879.

STATE OF ILLINOIS,
County of St Clair, ss:

MARY PRICE
vs.
REBECCA FOREMAN & AL.
} Bill to set aside will.

The defendants in the above cause, reserving to themselves all 13 right of exception to said bill of complaint, for an answer thereto, admits that one Isaac Foreman, late of said county, departed this life on the 28th day of October, A. D. 1878, leaving a widow, Rebecca Foreman, and the said complainant as his only heir at law. Deny that the said Isaac Foreman died seized of and possessed of real and personal property to a large amount, estimated at two hundred thousand dollars ($200,000.00). Defendants state that the said Isaac Foreman, deceased, during his lifetime duly made and published his last will and testament in words and figures as set out in complainant's bill of complaint, and that since the death of the said Isaac Foreman, to wit, on the fourth (4th) day of November, A. D. 1878, said will was filed in the office of the county clerk of said county, and that on said last-named day said will was duly probated and declared to be the last will and testament of the said Isaac Foreman, deceased, and that letters testamentary were granted by the probate court of said county to the said John J. Thomas, Frederick H. Pieper, and Theophilus Harrison as executors of the last will and testament of the said Isaac Foreman, deceased. Defendants 14 further state that owing to the fact that one of the said executors

Frederick H. ieper, at the time said will was filed in the office of the county clerk of said county, and duly probated in the county court of said county, was judge of the county court of said county, and that the said will and proceedings in said county court were certified to the circuit court of said county and filed in said court, and that on the 17th day of November, A. D. 1878, the said will was probated in said circuit court, and ordered to be recorded and to be filed in the county court of said county, of which complainant had notice. Defendants deny that the said Isaac Foreman at the time said will was signed by him was seventy-four years of age, and deny that his mind had become greatly impaired by age, and that he had become, and was at the time, and had remained to the time of his death of unsound mind and memory.

Defendants deny that the mind of the said Isaac Foreman was impaired, or that owing to his feelings on religious subjects, he was liable to be unduly influenced by others, or that his mind had been purposely directed and unduly influenced by designing persons to make such disposition
15 of his property as he actually did by said will; but that the said Isaac Foreman had long before the making of said will intended to make the will substantially as he made it, and these defendants expressly state that at the time of the execution of the said last will and testament the said Isaac Forman was of sound mind and memory and fully competent to execute the same, and that he was not unduly influenced by these defendants or any other person or persons whatever to execute the same, but executed the said will and testament of his own free will. And defendants deny that said will is null and void, but say that it is valid and in full force and effect.

And defendants deny each and every allegation of said bill not expressly admitted herein, and how having fully answered said bill pray to be dismissed, &c.

LOUIS P. KRAFFT AND
NOETLING & HALBERT,
Solicitors for Defendants.

Be it remembered that on the 20th day of September, 1880, the following petition was filed, to wit:

16 *Petition of American Bible Society & of Methodist Episcopal Church.*

In the circuit court of said county.

STATE OF ILLINOIS,
St. Clair County, ss:

MARY PRICE, COMPLAINANT, *against* REBECCA FORMAN, JOHN J. THOMAS, FREDERICK H. Pieper, Theophilus Harrison, the American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America, defendants.	Bill in chancery to set aside will, &c.

To the honorable the judge of the circuit court of St. Clair County, State of Illinois:

The petition of the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, de-

fendants above named, respectfully represent that since the filing of complainant's bill in the above-entitled cause, the said defendant, Rebecca Forman, one of said defendants, has, in pursuance of the provisions of the statutes of said State of Illinois, renounced the provisions of the will of said Isaac Forman, her late husband, and relinquished all claim to any and every bequest therein made to her, or for her benefit, and has elected
17 to take in lieu thereof her dower in the real estate and her distributive share or portion of the personal property which belonged to said Isaac Forman, as by law she was authorized to do; and said dower has been allotted to her, and she has also received the share or portion of personal property to which she thus became entitled; whereby the said Rebecca Forman ceased to have any further interest in, or legal connection with, this suit, or the controversy therein involved. Petitioners further state that said Thomas, Pieper, and Harrison have no interest in said controversy, and are only named in said will as executors, entrusted with a naked power of sale, and take no beneficial interest in said estate. The only persons interested in the controversy embraced in the above-entitled cause are the said Mary Price, complainant, who was at the commencement of this suit, and still is, a citizen of the State of Illinois. And your petitioners, who are each incorporated under the laws of the State of New York, and who were at the commencement of this suit, and still
18 are, located and doing business in said last-named State.

Petitioners further state that the amount in controversy in said cause exceeds the sum of five hundred dollars, exclusive of costs; that there is a controversy in said suit which is wholly between citizens of different States, to wit, the State of New York and the State of Illinois, and which can be fully determined as between them; that said cause is still pending and undetermined in the circuit court aforesaid and there has been no trial or final hearing therein.

Petitioners further state that they have reason to believe and do believe that from prejudice and local influence they will not be able to obtain justice in said circuit court of St. Clair County aforesaid. Petitioners offer herewith a bond with good and sufficient security, conditioned according to law, and pray this hon. court to accept this petition and said bond, and to order the removal of said cause to the circuit court of the United States for the southern district of Illinois, in which district the circuit court of St. Clair County aforesaid is located and held and to proceed no
19 further herein. And your petitioners will ever pray, &c.

THE AMERICAN BIBLE SOCIETY,
By GEO. P. STRONG & J. B. HAY, *their Attorneys.*
THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH OF THE UNITED STATES OF AMERICA,
By GEO. P. STRONG & J. B. HAY, *their Attorneys.*

STATE OF ILLINOIS, *County of St. Clair, ss:*

Louis P. Krafft, being duly sworn, says that he is one of the attorneys of the petitioners above named, who are corporations located and doing business in the State of New York; that he is familiar with the facts connected with the suit above referred to; that he is a citizen of said county of St. Clair, State of Illinois, and has resided there for more than thirty years, and is well acquainted with its citizens and has personal knowledge of the state of feeling touching the matters in controversy in the above-entitled cause. Affiant further states that from such knowledge he has reason to believe and does believe that, from prejudice and local influence, said petitioners will not be able to obtain justice in said State court.

LOUIS P. KRAFFT.

20 Subscribed and sworn to this 20th day of September, 1880, before me, a notary public within and for said county and State.

In testimony whereof I hereto affix my signature and official seal the day and year last aforesaid.

[SEAL.] ALBERT G. BADGLEY,
Notary Public.

Be it remembered that on the 22d day of September, 1880, the following bond was filed, to wit:

Bond on removal.

Know all men by these presents, that the American Bible Society of the city of New York, in the State of New York, and the Missionary Society of the Methodist Episcopal Church of the United States of America, also of the city and State of New York, as principals, and Charles T. Elles, of the county of St. Clair, and State of Illinois, as surety, are held and firmly bound unto Mary Price, of said county of St. Clair, State of Illinois, in the penal sum of five hundred dollars; for the payment of which, well and truly to be made to the said Mary Price, her heirs, executors, administrators, or assigns, the said American Bible Society and the Mission-
21 ary Society of the Methodist Episcopal Church of the United States of America, and said surety, do bind themselves, their successors, heirs, executors, and administrators, jointly, severally, and firmly by these presents.

In witness whereof, the said American Bible Society have caused their corporate name to be subscribed hereto, by their general agent, and their corporate seal to be hereunto affixed, and the said Missionary Society of the Methodist Episcopal Church of the United States of America have caused their corporate name to be subscribed hereto, by their treasurer, and their corporate seal to be hereunto affixed, and the said surety has hereto set his hand and seal this twentieth day of September, A. D. 1880.

The consideration of the above obligation is such that whereas the said Mary Price has filed her bill in equity in the St. Clair County circuit court in the State of Illinois, to the January term thereof, A. D. 1879, and against Rebecca Forman, John J. Thomas, Frederick H. Pieper, Theophilus Harrison, the American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America, being a suit brought to set aside and cancel the last will and testament of one
22 Isaac Forman, deceased, and whereas the said American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America have, on the 20th day of September, A. D. 1880, filed their petition in said court praying that said suit may be removed into the circuit court of the United States for the southern district of Illi-

nois, to the next term thereof, to be held at the city of Springfield, in said district, on the first day of the January term A. D. 1881, of said court:

Now, if the said American Bible Society and the said Missionary Society of the Methodist Episcopal Church of the United States of America, upon the granting of said petition, shall enter in the said circuit court of the United States on the first day of its next session aforesaid, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

AMERICAN BIBLE SOCIETY, { CORP. SEAL. }
By CALEB T. ROWE, *Gen. Agent.*
THE MISSIONARY SOCIETY OF THE METH. EPIS'L CHURCH, { CORP. SEAL. }
By JNO. M. PHILLIPS, TR.
CHARLES T. ELLES. [SEAL.]

23 Be it remembered that on the 21 day of September, 1880, the following answer was filed, to wit:

Answer of Rebecca Forman.

In circuit court, September term, 1880.

STATE OF ILLINOIS,
St. Clair County:

MARY PRICE
vs.
REBECCA FORMAN ET AL. } In chancery.

And now comes the said Rebecca Forman, one of the defendants in the above-entitled cause, and says that heretofore, to wit, on the 21st day of May, A. D. 1879, she filed her written renunciation in the circuit court of said county, which was duly entered of record, wherein she did renounce and quit all claim to the benefit of any legacy or devise made to her by the last will and testament of her deceased husband, the said Isaac Forman, electing to take in lieu thereof her dower or legal share of the estate of her said husband. Wherefore she says she has no interest in the above-entitled cause.

REBECCA FORMAN,
By MARSHALL W. WEIR,
Her Attorney.

Be it remembered that at the September term, 1880, the following
24 proceedings were had, to wit:

Order denying petition for removal.

MARY PRICE
vs.
REBECCA FOREMAN, JOHN J. THOMAS, FREDerick Pieper, Theophilus Harrison, American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America. } Bill to set aside will.

And now on the 22d day of September, 1880, comes the complainant by her solicitors, and the defendants by their solicitors, and the defendants the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America having presented their petition to remove this cause to the circuit court of the United States for the southern district of Illinois, and also filing their bond; and the court after hearing arguments and being fully advised in the premises denies the prayer of said petition.

STATE OF ILLINOIS,
St. Clair County, *ss*:

I, Charles Becker, clerk of the circuit court of St. Clair County, in the State aforesaid, do hereby certify the above and foregoing to be a 25 true and correct copy of bill, summons, answer, petition for removal of cause, bond, answer, and order of court (no depositions having been filed in said cause). And I further certify that this is a complete record, except as to the papers referring to the petition for removal at a former term in a certain cause lately pending in said court on the chancery side thereof, wherein Mary Price was complainant, and Rebecca Foreman & al. were defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Belleville, this 22nd day of September, A. D. 1880.

[L. S.] CHARLES BECKER, *Clerk*,
By GEO. W. SCHUESSLER, *Deputy*.

(Indorsed:) Filed September 23, 1880. J. A. Jones, clerk.

Afterwards, to wit, on the twenty-third day of September, in the June term of the circuit court of the United States for the southern district of Illinois, in the year of our Lord one thousand eight hundred and eighty, the following proceedings were had in said court in said cause and entered of record, to wit:

26 *Order of circuit court U. S. taking jurisdiction.*

MARY PRICE
v.
REBECCA FOREMAN, JOHN J. THOMAS, FREDerick H. Pieper, Theophilus Harrison, The American Bible Society, the Missionary Society of the Methodist Episcopal Church of the United States of America. } In chancery.

And now, on this 23d day of September, 1880, come the defendants the American Bible Society and The Missionary Society of the Methodist

Episcopal Church of the United States of America, and file herein a full transcript of the record from the circuit court of St. Clair County, Illinois, and move the court to take jurisdiction of this cause; and it appearing that the controversy in this case is wholly between the complainant, who is a citizen of the State of Illinois, and the corporations before named, who are citizens of the State of New York, it is therefore ordered by the court that said motion be sustained, and that the cause be placed on the calendar of this court, and that the clerk of the circuit court of St. Clair County, Illinois, certify and transmit to this court all of the original papers on
'27 file in the cause, and that said circuit court proceed no further with the cause.

Then afterwards, to wit, on the twenty-fifth day of April, in the January term of the said circuit court of the United States, in the year of our Lord one thousand eight hundred and eighty-one, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order overruling motion to remand.

Mary Price
v.
Rebecca Foreman, John J. Thomas, Frederick H. Pieper, Theophilus Harrison, American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America.
In chancery.

And now, on the 25th day of April, 1881, come the parties, by their counsel, and submit to the court the complainant's motion to remand this cause to the State court; and the court, having heard and considered said motion, doth order and decree that the same be overruled.

28 And afterwards, to wit, on the second day of May, in the January term of said circuit court of the United States, in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Motion for rehearing.

Mary Price
v.
Rebecca Foreman et al.
In chancery.

This day comes the complainant, by Messrs. G. and G. A. Koerner, her solicitors, and enters her motion for a rehearing of the decree entered herein April 25th, 1881, overruling motion to remand this cause to circuit court St. Clair County.

Then afterwards, to wit, on the twentieth day of June, in the June term of said circuit court of the United States, in the year of our Lord one thousand eight hundred and eighty-two, the following further proceedceedings were had in said court in said cause, and entered of record, to wit:

29 *Decree.*

MARY PRICE
v.
REBECCA FOREMAN, JOHN J. THOMAS, Frederick H. Pieper, Theophilus Harrison, American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America.
} In chancery.

And now, on this 20th day of June, 1882, come again the parties by their counsel and submit to the court the complainant's motion to remand this cause to the State court; and the court having heard and considered the same, it is ordered by the court that said motion be sustained, and that the suit be remanded to the State court, and that the prevous order overruling a motion to remand be set aside.

Afterwards, to wit, on the twenty-second day of July, in the June term of said circuit court of the United States, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

30 *Order allowing appeal.*

MARY PRICE
v.
REBECCA FOREMAN ET AL.
} In chancery.

And now, on this 22nd day of July, 1882, come the defendants, the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, by their counsel, and pray an appeal to the Supreme Court of the United States from the order of this court remanding this cause to the State court; the appeal to operate as a supersedeas; and the court having heard and considered the application, doth allow an appeal on said defendants entering into bond to the complainant in the penalty of five hundred dollars, with security to be approved by the court, and conditioned as the law directs.

Whereupon, on the tenth day of August, in the year last aforesaid, came the defendants, the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, and filed in the clerk's office of said circuit court of the United
31 States their appeal bond herein; which said bond is in the words and figures following, to wit:

Appeal bond.

Supreme Court of the United States.

MARY PRICE *vs.* REBECCA FOREMAN, JOHN J. THOMAS, FREDERICK H. Pieper, Theopolis Harrison, American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America.	In chancery.

Know all men by these presents that we, George P. Strong, for the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, as principals, and William C. Buchanan, and C. T. Elles, as sureties, are held and firmly bound unto Mary Price in the sum of five hundred dollars, to be paid to the said Mary Price, her heirs, executors, and administrators; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly 32 by these presents. Sealed with our seals and dated this 28 day of July, A. D. 1882.

Whereas the above-named, the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named, the American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

GEO. P. STRONG, [SEAL.]
For American Bible Society.
WM. C. BUCHANAN, [SEAL.]
C. T. ELLES, [SEAL.]
GEO. P. STRONG, [SEAL.]
For the Missionary Society of the Methodist Episcopal Church of the United States of America.

Sealed and delivered in presence of—
A. G. BADGLEY, *Notary Public.* [L. S.]

(Indorsed:) Filed August 10, 1882. J. A. Jones, clerk,

33 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause, wherein Mary Price is complainant and Rebecca Foreman, John J. Thomas, Frederick H. Pieper, Theophilus Harrison, American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America are defendants, as truly as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield, in said district, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

[SEAL.] J. A. JONES, *Clerk.*

Received of Geo. P. Strong, esq., $7.50 for copy of record in case of Price vs. Foreman.

J. A. JONES, *Clerk.*

SPRINGFIELD, ILLS., *Sept. 16th*, 1882.

(Indorsed:) Costs of record for U. S. Sup. Court, Price vs. Forman, 7.50. Sep. 15, 1682.

(Indorsement on cover:) No. 1047. The American Bible Society and the Missionary Society of the Methodist Episcopal Church of the United States of America, appellants, vs. Mary Price. S. Illinois, C. C. U. S. Filed 12th October, 1882.

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110-61

OFFICE SUPREME COURT U.S.
FILED
DEC 12 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

October Term, 1883.

AMERICAN BIBLE SOCIETY ET AL.,
Appellants,
vs.
MARY PRICE,
Respondent.

No. ~~1047~~. 709,

APPEAL FROM THE U. S. CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Statement and Brief for Appellants,

—BY—

GEO. P. STRONG.

man, John J. Thomas, Frederick H. Pieper, Theophilus Harrison, American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America are defendants, as truly as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield, in said district, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

[SEAL.] J. A. JONES, *Clerk.*

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Supreme Court of the United States

October Term, 1883.

AMERICAN BIBLE SOCIETY ET AL., *Appellants*, vs. MARY PRICE, *Respondent*.	No. 1047.

APPEAL FROM THE U. S. CIRCUIT COURT SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT AND BRIEF FOR APPELLANTS,

—BY—

GEO. P. STRONG.

This is an appeal from the decision of the Circuit Court of the United States, for the Southern District of Illinois, remanding this cause to the Circuit Court of St. Clair County, Illinois.

On the 18th day of November, 1878, the complainant filed in the Circuit Court of St. Clair County, State of Illinois, her bill in equity, to contest the validity of the last will and testament of Isaac Foreman, which had been admitted to probate on the 17th day of November, 1878.

The parties to this proceeding were Mary Price, sole heir at law of Isaac Foreman, complainant; Rebecca Foreman, widow of Isaac Foreman; John J. Thomas, Frederick H. Pieper and Theophilus Harrison, executors; the American Bible Society, and the Missionary Society of the Methodist Episcopal Church of the United States of America, residuary legatees, respondents. (Rec. pp. 1, 2, 3 and 4.)

The bill charges that Isaac Foreman, at the time of making his will was of unsound mind and memory. It also charges, inferentially, that he was unduly influenced to make this will; that his estate is estimated to be worth two hundred thousand dollars.

All these allegations are denied in defendants' answer.

1. By the terms of his will, testator gave to his wife Rebecca, his homestead, containing nearly three hundred acres, for life, and all his household furniture, farming utensils, etc., absolutely. (Rec. p. 2.)

He also provides as follows:

2. "I do hereby appoint John J. Thomas, Frederick H. Pieper and Theophilus Harrison, all of Belleville, St. Clair County, Illinois, as executors of this, my last will and testament, and trustees for the purposes hereinafter stated."

3. "I direct and empower my said executors to sell and convey, at public or private sale, and on such terms as they may think best, the whole of my real and personal estate not hereinbefore devised, and to convert the same into money."

4. "After the payment of all my just debts, I give and bequeath to my said executors, the sum of two thousand dollars, in trust, for the use and benefit of my daughter Mary Price, during her natural life. I desire my said executors to safely loan or invest said sum of

money, and pay to my said daughter, the interest or profits thereof, annually, during her life, and after her death, the proceeds or interest thereof, to be paid annually, for the maintenance and education of her child or children, and such principal sum to be paid to her child or children, when he, she or they shall become of age. And should my said daughter die, leaving no child or children, or should all of them die before coming of age, then the said sum of two thousand dollars shall be payable by my said executors, two-thirds thereof to the American Bible Society, and one-third thereof to the Missionary Society of the Methodist Episcopal Church of the United States of America."

By the fifth clause of his will, he gives two-thirds of the remainder, including the proceeds of the homestead, after the death of his wife, to the Bible Society, and the other third to the Missionary Society above named.

This will was made July 28, 1874. Isaac Foreman died October 28, 1878. (Rec. pp. 2 and 3.)

On the 21st day of May, 1879, Mrs. Rebecca Foreman renounced, under the will, and elected to take her dower and distributive portion under the statute.

On the 20th day of September, 1880, the American Bible Society and the Missionary Society filed their petition for removal. The petition and bond were presented September 22d, 1880. (Rec. pp. 8–10.)

The petition alleges, "that since the filing of the complainant's bill in the above entitled cause, Rebecca Foreman, one of said defendants, has, in pursuance of the statutes of Illinois, renounced the provisions of the will of Isaac Foreman, her late husband, and relinquished all claim to any and every devise and bequest therein made to her, or for her benefit, and has elected to take in lieu thereof, her dower in the real estate, and her distributive share of the personal property which belonged to said Isaac Foreman, as by law she was author. ized to do, and that she has received her dower, and her share of the personal property. "Whereby the said Rebecca Foreman ceased to have any further interest in, or legal connection with this suit or the controversy therein involved." (Rec. p. 7).

The petition for removal further alleges, that the said Thomas Pieper and Harrison, have no interest in said controversy, and are only named in said will as executors, entrusted with a naked power of sale, and take no beneficial interest in said estate; that the only persons interested in the controversy are complainant, Mary Price, a citizen of Illinois, and petitioners, corporations chartered by, and doing business in the State of New York; that the amount in controversy exceeds five hundred dollars, exclusive of costs; that there is a controversy in said suit which is wholly between citizens of different States, and which can be fully determined as between them; that this cause is still pending, and undetermined, in said Circuit Court, and there has been no trial or final hearing therein. The petitioners further state that they have reason to believe, and do believe that from prejudice and local influence they will not be able to obtain justice in said Circuit Court of St. Clair County. (Rec. p. 7).

The petition and a bond were presented to the St. Clair Circuit Court, September 22, 1880, and the prayer of the petition was denied. (Rec. p. 10.)

A transcript of the record was then filed in the U. S. Circuit Court for the Southern District of Illinois, and a motion made that the court take jurisdiction of the cause. This motion was sustained. (Rec. p. 11.)

A motion was then made to remand the cause. This motion was overruled.

A motion for a rehearing was made and sustained.

On the rehearing, the motion to remand was sustained and an order entered remanding said cause. From this order, an appeal was taken, and the cause is now here on the appeal of petitioners. (Rec. p. 12)

BRIEF AND ARGUMENT.

Counsel for respondent, on page 3 of his printed brief, alleges that if the record had been full, certain proceedings would have appeared, showing that a previous attempt to secure the removal of this cause, had been unsuccessfully made. It seems too late and out of place to make any such allegations, after the question of a removal has been twice argued in the lower court; no plea of *res adjudicata* having been filed, or any other objection made, except that on the face of the petition, the U. S. Circuit Court had no jurisdiction.

If such plea had been filed below, it could have been shown that this was the first and only petition for removal that had been filed since Mrs. Foreman renounced her interest under the will.

If the real parties to the controversy possess the requisite qualifications as to citizenship, *at the time the petition for removal is filed*, the cause can be removed.

Johnson *vs*. Monell, 1 Woolworth, 390.
Dillon on Removal, 39, note 2.
Bixby *vs*. Course, 8 Blatchf. R., 73.
Curtin *vs*. Decker, U. S. C. C E. D. of Wis., Jan. 22, 1881. Vol. 13, *Ch. Leg. News*, Feb. 5, 1881, p. 171.

The objection that a previous application had been made, should have been brought before the Circuit Court, if it was to be set up as a bar to a removal now.

Dillon, 92-3, note 3.
Dillon, 105, n. 2.

If an application for removal had been made before Mrs. Foreman had relinquished her rights under the will, it could not of course have been sustained, as she was a citizen of the same State as the complainant. But after she relinquished, her relations to this proceeding were entirely changed. She now has no interest whatever in the controversy. It is a matter of indifference to her whether the will is sustained or set aside. She takes under the statute, and not under the will.

Mrs. Foreman's supplemental answer, filed in this case, September 21, 1880, alleges that she had renounced all interest under the will, on the 21st day of May, 1879, more than a year before the petition and bond for removal were presented to the State court.

The petition for removal alleges this renunciation, and that fact is not denied.

It is the fact of renunciation that fixes the status of the parties, and not the time when it was first brought to the notice of the court.

Mrs. Foreman had a right to renounce her interest under the will, and take under the statute.

Rev. Stat., Ill., 1874, p. 424, secs. 10 and 12.

The respondent's counsel is correct in stating that this application for removal was not made "at or before the first term at which the cause could have been tried." The petition does not allege anything of the kind. It alleges that the cause was still pending and undetermined, and that there had been no trial or final hearing therein. This is not denied. Whatever right of removal exists, is claimed under that provision of the statute which makes an application at any time "before the trial or final hearing of the suit" sufficient.

The point made by respondent's counsel, page 6 of his brief, "that as to the time of making the application, the laws of 1866 and 1867 are repealed, has been several times ruled the other way.

Cook *vs.* Ford, 4, *Cent. L. Jour.* 560. Dillon 25, 29-30.

Whitehouse *vs.* Con. Fire Ins. Co. 2, *Fed. Reporter*, p. 498.

The act of March 2, 1867, (14 Stat. at Large, p. 588) provides as follows: " When a suit is now pending, or may hereafter be brought, in any State court, *in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State*, and the matter in dispute exceeds five hundred dollars, &c., it may be so removed on the petition of the latter, whether he be plaintiff or defendant, *filed at any time before the trial or final hearing of the suit*, if before, or at the time of filing said petition, he makes and files in said State court, an affidavit, stating that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such State court.

A repeal as to the time of filing a petition for removal, under this act, would in effect be a repeal of the act.

There would be no right secured by it that does not exist under the Act of 1875. The latter act secures the right of removal, not only where one party is a citizen of the State in which the suit is brought, and the other a citizen of a different State, whether there be prejudice or not, but it goes farther and secures such right where the parties are citizens of any different States. The Act of March 2, 1867, gives the right of removal, on account of prejudice or local influence, at any time before the trial or final hearing of the cause, and this right is not secured by the Act of 1875. Hence that provision is not repealed. See authorities above cited.

It would be a very senseless provision to say that a cause might be removed, where there was prejudice, &c., if the application to remove must be made before any opportunity had been given to find out whether or not there was prejudice or a local influence adverse to the petition.

Railway Co. *vs.* Whitton, 13 Wall. 270, op. 289, 290.

Again, it is contended that the provision allowing an appeal from an order remanding the cause, is unconstitutional.

This objection comes rather late after this Court has been hearing and determining similar causes, brought up on appeal, for nearly eight years.

Railway Co. *vs.* Whitton's adm'r, 13 Wall., 270, op. 289, 290.
Vannevar *vs.* Bryant, 21 Wall., 41.

The cases cited by respondent's counsel are dealing with an entirely different question, and are inapplicable to the question raised in the case at bar. They refer to decisions affecting the merits of the cause. No such question has been passed upon in this case.

The removal acts give the right to a trial in the Federal court, whenever the case comes within the terms of those acts.

If the Court remands the cause, that is a final order settling that right, which is the only question before the Court. Unless an appeal were granted to the petitioner upon an adverse ruling, that would be the end of the case in that court. But it is not correct to say the other party has no appeal; he has the same right to an appeal or a writ of error, that all suitors in the Federal courts have. After the case has been tried on the merits, if the amount, or subject-matter, allows, he may take his appeal to the Supreme Court, and assign for error the refusal to remand the cause, and for that error, if error be found, the judgment may be reversed. Such appeals have been successfully made.

Railroad Co. *vs.* Koontz, 104 U. S. R., p. 16, top of page.
Knapp *vs.* R. R. Co., 20 Wall., 123.
Babbitt *vs.* Clark, 103 U. S. R., 606-611.

The next question, and what seems about the only debatable question in this case, is this:

Do the executors occupy such relations to this controversy as to make the fact of their residence in the same State as the respondent, a bar to petitioners' right of removal? Appellants insist that they do not; that their connection with the case is official, and not personal, and that as the controversy now stands, the real substantial interests in the estate to be affected by a decision, are not represented by the executors, but by the complainant and the petitioners.

The statute of Illinois, under which this suit is brought, after making provision by which the will is to be probated, and letters testamentary granted, etc., proceeds as follows: "Provided, however, that if any person interested shall within three years after the probate of any such will, testament or codicil, in the county court aforesaid, appear, and by his bill in chancery contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county, etc., * * according to the practice of courts of chancery in similar cases."

Revised Stat. of Ills., 1874, sec. 7, p. 1103.

The Act gives no direction as to what persons shall be made parties, but it provides that it shall be tried by a jury, in the circuit court, "according to the practice of chancery courts in similar cases."

The simple issue is, *devisavit vel non.* As to parties, the general rule in chancery proceedings is that all persons who have an interest that will be affected by the final decree, should be made parties, *and the reason of the rule is that they may be bound by the decree*, and that no subsequent suit shall be necessary to settle their rights, or the rights of any party to the suit. There is also a distinction between necessary parties, and those who are not necessary, but proper parties. The latter may have an indirect interest, but not a substantial interest.

But the statutory proceeding, under which this and similar suits are brought is entirely different in its nature and purpose from an ordinary suit, either at law or in equity. Strictly speaking there are neither plaintiffs nor defendants. All parties interested, have a right to take part in the proceedings. It is in the nature of a proceeding *in rem.* It acts directly upon the will, or paper purporting to be a will.

The probate court acts upon the subject-matter, or rather upon the paper, in the first instance, and either rejects it, or admits it to probate as the will of the testator. The paper is propounded by the executor named in it, *or by some party interested.* No other person is summoned, or required to appear, except the witnesses attesting the will. This is called the *proof* of the will, in common form, and unless some party contests the will in the manner prescribed; that is, by a bill in chancery, in Illinois, within three years, this original probate becomes conclusive, and binds all the world. If a bill is filed to contest the validity of the will, it brings the case into the circuit court, and requires the propounders of the will to appear in the court, and make proof of the will in solemn form. In this proceeding the contestants are required to bring in all parties having an interest, either for or against the will. The circuit court assumes the functions of the probate court, and hears the proofs offered, having summoned a jury, to try the issues of fact. If the jury find in favor of the will, the court enters a decree, that the paper writing is the last will and testament of the testator. This decree does not directly settle the rights of any party to the proceeding. But incidentally it settles a real controversy between those who would take the estate, or a larger share of it, if the paper is declared invalid as a will, and those who take under the will.

It is therefore a controversy between parties having substantial interests under the will, and those having substantial rights adverse to the will.

Yet neither party can control the proceedings, and in this, the case differs from an ordinary suit. Neither proponents nor contestants can take a non-suit or dismiss the proceedings, without prejudice. The court is bound to proceed to a settlement of the question, will or no will, by a final decree.

Benoist *vs*. Murrin, 48 Mo. R., 48.

I find no case where executors, as such, have been held to be necessary parties They are proper parties, because if the instrument is held to be a will, they have a right to administer the estate or execute the will. It is not necessary that they should do so. They may decline the office, and refuse to take upon themselves any trust conferred upon them. Still the contest would go on at the instance of any party interested in having the will probated.

In the case of Frazer *vs*. Johnson, 106 U. S. Rep., 191, the *legatees* propounded the will. It was held that the suit in the Circuit Court could not be removed, because some of the heirs and contestants, who were the real parties to the controversy, resided in the same State with the propounders of the will.

Cases are found where courts have decided that in proceedings to prove the will in solemn form, the legatees and devisees are necessary parties, and that all parties interested must be made parties to "*witness* proceedings." This is the rule in chancery.

Brown *vs*. Anderson, 13 Ga. Rep., 171.
Eddie *vs*. Parke, 31 Mo., 513, op. 515.
Benoist *vs*. Murrin, 48 Mo., 48.
Citing the opinion of Ch. J. Ruffin, in the case of St. John's Lodge *vs*. Callender, 4 Irid, (Law) op. 342-3.
1 Redfield on Wills, 29, bottom of page.

Though executors have the right to propound the will, and perhaps owe it to the memory of a deceased friend, who has reposed in them so important a trust, that they should endeavor to carry out his wishes, it often happens that they decline the office and any trust imposed upon them. That does not in the least affect the proceedings to prove up the will, either in the probate court, or in solemn form, in the circuit court. Nor are they obliged to make any formal transfer of their duties or rights, as executors. If the will is sustained, the probate court will appoint an administrator, *de bonis non*, with the will annexed, to administer the estate, and if a special trustee is required, the chancery court has full power to appoint one.

The executors under the will of Jsaac Foreman, as such, were only clothed with a power of sale. The language of the will in item three is:

"I direct and empower my said executors to sell and convey, at public or private sale, and on such terms as they may think best, the whole of my real and personal estate not hereinbefore devised, and to convert the same into money."

Under this provision the executors take no beneficial interest in any part of the estate, which is the subject of controversy. They have no interest in the fee.

1 Williams on Executors (6th Am. ed.) bot. page 654; top page 725, notes x, y.
1 Sugden on Powers, (6th ed.) 133.
1 Powell on Devises, (3d ed.) 245 et seq.
Gill *vs.* Grand Tower Mining Co., 92 Ill., op. 254.

Sugden, after examining many cases, concludes that, "even a devise of land to be sold by his executors, without words giving the estate to them, will invest them with a power only, and not give them an interest."

Kent, C. J., in Bergen *vs.* Bennett, 1 Caines Cases, 16, holds that "a direction and authority to sell" (the very words used in this will) "is a bare authority, without an interest."

In Gill *vs.* Grand Tower Mining Co., 92 Ills., at page 254, the Supreme Court of Illinois held that, where lands were directed to be laid off into lots, and part given to heirs, and part directed to be sold, the executor takes only a naked power to sell: he takes no interest.

In 1 Williams' Executors, top of page 725 and notes, it is held that "a devise that executors shall sell the land, or that lands shall be sold by the executors, gives them but a power."

In this will the language is still more clear. "*I direct and empower* my said executors to sell etc."

Chew *vs.* Hymen, U. S. C. C N. D. of Ills., April 21, 1881. Vol. 13, *Ch. Leg. News*, pp. 287, 288.

It is urged that by the fourth item of the will, the executors acquire an interest that makes them necessary parties. In this item, testator says:

4. "After the payment of all my just debts. I give and bequeath to my said executors, the sum of two thousand dollars, in trust, for the use and benefit of my daughter Mary Price, during her natural life," to pay the interest or profits, to her, during her life, and after her death, to any child or children she may leave, and to pay the principal to such child or children, on their coming of age. And if she leaves no child surviving her, then to pay the principal to the two societies.

It will be noticed that the bequest is to them as executors, *virtute officii*. If either of them were to die or resign, this naked title would pass to the survivors.

2 Story Eq. Juris., sec. 1062.

No deed of assignment or transfer would be required from the resigning executor, nor from his representative, in case of death. If the bequest had been personal, the power or title would not survive, and could not be executed by survivors. In the sense of occupying a position of confidence and trust, executors, and indeed all persons who hold and manage property, real or personal, for other parties, are trustees and accountable as such.

2 Story Eq. Juris., (10th ed.) sec. 954, p. 163.
2 Story Eq., secs. 1060 and 1061.

The author here applies the term "trustee" to cases where trusts are vested in executors, by the mere fact of their appointment, and where evidently, a simple power is intended, with a direction to pay over proceeds, etc., and where no legal title is vested in the trustee.

If all the executors were to die or resign, the trust would be executed either by an administrator *de bonis non*, or by a court of chancery, by appointing a trustee. Such appointment would not vest in the trustee a beneficial interest.

2 Story Eq. Juris., sec. 1061.

If, in such case a court of chancery were to appoint Mrs. Price trustee, as it might, would her *real*, *substantial* interest in this $2000 be enlarged? Not in the least, I apprehend. She would have then what she has now, under the will, the entire use and benefit of the bequest, during life.

And if we look at the substance and not the shadow; if the true spirit and intent of the removal acts are to be carried out, by allowing a removal whenever there is "a controversy between citizens of different States," and if these acts are to be construed according to the position of the parties who are substantially interested in the controversy, that is, the parties who are to gain or lose by the result, it would be no more a controversy between citizens of different States, with Mrs. Price as trustee, than it is now.

Suppose the executors, instead of denying the allegations of the complainant's bill, had admitted them, would that have altered the character of the controversy? Would not the parties interested have been obliged to prove the will in solemn form? Would not Mrs. Price have been obliged to produce proof sufficient to establish the invalidity of the will, just the same as now? Would the admissions of the executors have relieved her from the production of proofs, and would not the same subject-matter of controversy have then existed between her and the two societies that now exists? I do not see on what ground the executors' admissions could have been received against the societies. They could not be said to be admissions against their interest, for they have no interest. As I have before stated, they are indifferent to the result of the controversy, neither benefited by a decree sustaining the will, nor would they suffer any loss by a decree holding it null and void.

Hewett *vs.* Phelps, 105 U. S. Rep., 393.

I therefore submit that such a shadowy, unsubstantial interest in, or relation to this controversy, ought not to deprive the petitioners of the benefit of the Act of Congress, passed for the express purpose of affording to citizens of different States a remedy in the Federal courts, that their rights may be protected, in cases of prejudice or local influence, whenever the real, substantial controversy was between them and others.

In the case of Sewing Machine Companies, the defendants, one of whom was a quasi citizen of the same State with the plaintiff, were jointly liable to plaintiff, if he had any right of action at all.

85 U. S., 18 Wall., 553.

A substantial judgment was sought against all defendants.

The cases referred to by counsel for respondent, where executors and trustees are held to be necessary parties, are cases where some substantial relief is sought either by or against them.

In the case of Bank *vs.* Andrews, 130 Mass., 431, a judgment was asked against Pierce, by which the bank would recover the amount of their debt against Adams, from him, as the trustee holding the funds in which Adams had an interest.

No such result is sought in this proceeding. The $2000 are not in the executors' hands as yet, as trustees under the will. The suit is one *sui generis.* No judgment against the executors is asked. Complainant asks that the will be declared void. If that were to be the result of the suit or controversy, who would be injured? Certainly not the executors; only those who were to be benefited by the provisions of the will.

If these executors had refused to act, the residuary legatees, or any party interested, could have presented this will for probate, and upon its being admitted to probate, the heir could have filed her bill to set it aside, as she has done. In such a suit, she and these societies would have been the only necessary parties

I cannot think that Congress intended, or that a fair construction of the law requires, that these real contestants, having the requisite citizenship, should be deprived of the benefits of this act, by the circumstance that executors not having the requisite citizenship, whose only function is to settle up the estate and pass over to the real parties in interest, the legacies made to them, or for their use or benefit, retaining not one dollar of beneficial interest for themselves, are made parties in such a proceeding as this. The executors are no more interested in the controversy respecting the validity of this will, than an attorney in fact, under letters of attorney, giving him power to sell certain real estate, would be, in a suit or controversy between his constituent and a stranger, involving the title to such real estate. If the title was declared invalid, his letters of attorney would confer no power over the estate. So, if this will is declared invalid, the power to execute its provisions, or to sell the estate, which the executors enjoy under the will, would fall to the ground. It could not be executed. But such a result would not affect any personal or substantial interest of the executors, as such. Not so with petitioners. They gain or lose the residuum after payment of debts, etc.

The same may be said touching the executors' interest in the $2000. After the estate is settled up, they would be entitled to their discharge as executors. Their present connection with the estate, which is now purely official, (or formal, if you please,) would then cease. This $2000 does not exist as yet, as a distinct fund. It forms an undistinguishable part of the estate in mass, and the complainant is the first, and for the time being the only, party having a beneficial interest in it.

Under the will and by virtue of letters testamentary, these executors take control of all the property of this estate. But it does not belong to them. It belongs to creditors, or legatees, or distributees,—to those who are to have the use and benefit of it.

This proceeding does not directly act upon the executors. Whatever the result, no decree can be rendered by the court trying this cause, taking from the executors their control over this property, or removing them from their office. If the will is declared invalid, and they refuse to surrender the property, another suit or proceeding in some other court would be necessary to revoke their powers as executors, and another and different kind of suit, to take from them the property, if they still held control of it. Not so with those beneficially interested. If this suit goes against them, that is the end of all controversy, so far as they are concerned. They have no possession of the property, and all the right they have is under the will. If that is invalid; all their rights are ended. This controversy is then, as I have endeavored to show, emphatically and exclusively between them, and the party seeking to invalidate the will.

Will the Removal Acts close the doors of the Federal courts to them, because executors clothed only with such powers and control as this will and their letters testamentary give, have been made parties defendants with the petitioners?

In Sewing Machine Companies, &c., 85 U. S. (18 Wall.) op. p. 586, Justice Clifford, in the opinion of the court, says: "The right of the defendant cannot be defeated by joining with him a mere nominal party."

In Osgood *vs.* The Ch. D. & V. R.R. Co. U. S., Circuit Court, N. Dis., Ill., April 1875, Drummond, J., 2 *Central Law Journal*, p. 283, it was held that when the main controversy is between citizens of different States the suit may be removed from the State to the Federal court, notwithstanding such removal will necessarily carry with it an incidental controversy between citizens of the same State

The case of Hewett *vs.* Phelps, 105 U. S. 393, was this: Mrs. Vick conveyed her entire estate to Jonathan Pearce, upon trust for the benefit of herself and husband during life, and for her children after death, (a trust identical with that upon which Foreman's executors will take the two thousand dollars.) Plaintiffs were citizens of Louisiana, Phelps and wife, who petitioned for a removal, were citizens of Kentucky, as was the trustee, Pearce.

The object of this suit was to reach the property of which Pearce held the legal title, to satisfy plaintiffs' claim against Phelps, whose wife was the beneficiary.

The Court says, Pearce is "a trustee merely of the title without any active duties in regard to the estate."

The cause was removed. The citizenship of Mrs. Phelps controlled the removal, not that of Pearce, the trustee.

In the case at bar, the executors are not the actors in the case, on either side; nor is any right or relief against them directly sought by complainant. If they were all to die or resign, I apprehend the contest as to the validity of the will, could proceed without any revival in the name of their successors. When it is established that there is a will, the executors, or an administrator with the will annexed, will proceed to execute it. The proceeding being a bill in equity, it would be sufficient that the beneficiaries, the parties entitled to the use of the property, were before that court, unless some affirmative action on the part of the executors was required. Mrs. Price, the complainant, is entitled to the use or full benefit of this legacy of $2000 during her natural life, and if she die without heirs, the absolute property in it vests in the two societies. These parties are before the court, and occupy opposite sides in this controversy. The executors at present have only the same control over and interest in that part of the estate, that they have in all the rest. It is not a right of property, but only a right or power to administer the estate, *virtute officii.* When the estate is converted into money and settled, and all debts and claims paid, then this $2000 is to be transferred from themselves as executors, to themselves as trustees, and they will then be vested with the naked legal title to the fund, to pay over the profits or income in strict conformity with the directions of the will. The complainant is the first, and for the time being the only, party having a beneficial interest in this fund.

In determining who are the real parties to the controversy, a court of chancery will regard the substance, that is, the beneficial ownership of the fund, and not the naked legal title by which it is held.

> Hewitt *vs.* Phelps, 105 U. S. Rep., 393, cited above.

I submit that in construing the Removal Acts, this Court may well take the same view. While this is in terms a controversy as to the validity of the will, it is in effect, a controversy as to the ownership, or beneficial interest in the estate. That controversy is emphatically between citizens of different States. The propriety of making the two societies parties to these proceedings cannot be questioned. And why? Not because they hold, or ever will hold the legal title to the estate in its present form, but because they will be entitled to the residuum, after it is converted into money, and after the prior claims are settled, that is, because they are the parties directly benefited by the will. The real controversy is with them.

If the interest on the legacy of the $2000 had been bequeathed to a stranger, I apprehend a court of chancery would have deemed it sufficient, if such stranger, the owner of the beneficial interest, had been made a party without the executors. The two societies and such legatee would have represented the beneficial interest in the entire estate, remaining after payment of debts and expenses of administration.

In Wormley *vs*. Wormley, 8 Wheat., 421, the Court holds that it will be sufficient if the parties who have the real interest are before it.

No relief is sought against the executors; the Court will render no decree or judgment against them, or in their favor.

If the will is held invalid, Mrs. Price, complainant, gets the entire estate. If it is upheld, the legatees of the beneficial estate take it. In neither event, do the executors take any beneficial interest.

If a suit were brought to recover portions of this fund, which had been loaned out, the executors would be necessary parties, if not the only parties plaintiffs. Or if Mrs. Price were suing to recover the interest on this fund, received by the executors as trustees, undoubtedly they would be necessary parties. They would be the parties in both cases, to be directly affected by the judgment.

The executors would then be in the condition of the executors in the case of Blake *vs*. McKim, 103 U. S. Rep., 336. The plaintiff sought to enforce a liability upon the bond executed by the testator. In such case he must sue the executor and recover a judgment against him, or he cannot recover at all. In no other way can he reach the fund. Hence the case was not removable, because the plaintiff and the real defendant, the trustee, were citizens of the same State; and this furnishes a good illustration of the difference between the case at bar and those cases where the executor is held to be a necessary party. In one, no judgment is sought against him, either in his personal or representative character.

He is nothing more than a person who is named in the will to take charge of the estate and ultimately hand it over to the legatees and devisees entitled under it. If the will is set aside, these parties lose all the will gives them. The executors lose nothing.

This controversy is in terms a proceeding set on foot by those who deny the validity of the will, requiring those interested in sustaining it to furnish solemn proof of its due execution. As the authorities already quoted show these parties are neither of them plaintiffs nor defendants. They are heirs at law, &c., whose pecuniary interests are involved in the question of will or no will, which the Circuit Court is to try. If the will is maintained, the executors have the right to take charge of the estate, settle it up; they must then turn over every dollar of it to those entitled under the will.

Can this be such a controversy between complainant and these executors, as is to control the jurisdiction of the Federal Court under the Removal Acts?

I find no case where a removal has been refused because the executors, holding nothing but the naked legal title, no connection with the case that would authorize a decree for or against them, have been citizens of the same State as the party seeking to remove the cause. These acts evidently respect the substantial rights of the parties, and without regard to the position they occupy, give the right to a removal, whenever those who are substantially interested; that is, those who win or lose by the result are citizens of different States, and on different sides of the controversy.

In this case, the only parties who stand in the way of Mrs. Price's securing the estate of the testator, are the two petitioners. As their rights rest upon the will, complainant attacks the validity of the instrument. She alleges that it is not the will of Isaac Foreman; the petitioners allege that is his will. This is the controversy, and they are the parties to it and the only parties who have any pecuniary interest in it, and they reside in different States.

In Bacon *vs.* Rives, 106 U. S. Rep., 99, the suit was against Geo. C. Rives, a citizen of Texas, and the executors of his father, a citizen of Virginia, in whose estate Geo. C. Rives had a large interest. The complainants were all citizens of Virginia. It was held that the executors had no interest in the controversy, merely held the position of garnishees, and their citizenship in Virginia did not prevent a removal. That is, they were stakeholders (of the subject of the controversy) and were indifferent as to the results, has no pecuniary interest in the question. Op. by Harlan, J. p. 104.

So in this case, the executors will have control of the property in dispute, if the will is sustained; but they are indifferent as to the result of the controversy. Suppose the will is duly proved, and on the death of Mrs. Price, leaving only one child, two persons should present themselves, and demand of the trustees the interest on this fund. The trustee might in such case file a bill of interpleader, submit the money to the control of the court, and ask that these two claimants interplead and establish their title. To such a proceeding the trustee would not be a necessary party, because he would have no interest in the controversy. In Wormley *vs.* Wormley, 8 Wheat. 421, the Supreme Court says, op. page 451, "This Court will not suffer its jurisdiction" (in an equity case) "to be ousted by the mere joinder, or non-joinder, of formal parties, but will rather proceed without them, and decide upon the merits of the case *between the parties who have the real interests before it*, whenever it can be done without prejudice to the rights of others."

"No person should be made a party who has no interest in the suit, and against whom, if brought to a hearing, no decree could be had."

Story Eq. Pl., sec. 72, 229, 231.
2 Story's Eq. Juris., sec. 1499, note 5.
Dillon on Removal, (3d ed.) page 32.

In Wood *vs.* Davis, 18 How. 467, op. 471, it is held that agents and attorneys are not proper parties. A trustee or stakeholder may be a proper party, *if the object of the suit is to enforce the trust.*

Miller *vs.* Whittaker, 23 Ill., 453.

In this case notes and deeds for land were made to Miller, the agent. The Court held that he was a *mere trustee*, acting for his principal, and that it was the principal whose rights would be regarded in a court of equity, and no decree could be rendered, until the principal was made a party.

If no executors had been named in this will, the controversy touching its validity could have arisen in the Circuit Court, as provided by the statute, just the same as now. Would any court have held that there was a defect of parties?

It is where an administrator or executor sues or is sued for the purpose of obtaining the fund or affecting it in his hands that he is the real and not a nominal party.

Dodge Ex. *vs.* Perkins, 4 Mason, 435.
Com'rs of Arapahoe county *vs.* Pacific R. R. Co. and others; in the U. S. C. C., District of Colorado. *4 Law & Eq. Reporter*, p. 181.

It will be found, I think, that all the cases cited by the learned counsel for the respondent, which lay down the principle that the executor is a necessary party, are cases in which the object of the suit is to reach the fund in the hands of the executor, or where he is seeking to enforce a right which is vested in him as executor.

Such was the case in 130 Mass., 431.

In the case of Hall *vs.* Irwin, 2 Gilm., 176, decided by the learned counsel for respondent, he held that a direction to sell land creates a naked power, p. 180.

"Where an estate was to remain in the hands of executors for the use of the widow and children until the youngest child became twenty-one years old, the executors or trustees took no interest in the estate but a simple power."

1 Perry on Trusts (3d ed.) sec. 308.
Citing Burke *vs.* Valentine, 52 Barb. 412.

I therefore respectfully submit that the petitioners come within the letter and spirit of the Act of 1867, and that this is "a controversy between citizens of different States," which ought to be removed upon an affidavit of prejudice and undue influence by those who alone, of defendants, can suffer loss if such prejudice is allowed to contwol the decision of the case, and that this right ought not to be denied them because of the presence of other parties, citizens of Illinois, as defendants, who cannot take and do not claim, a particle of benefit from this estate.

GEO. P. STRONG,
Solicitor for Appellants.

110-61

OFFICE SUPREME COURT U.S.
FILED
DEC 19 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883.

AMERICAN BIBLE SOCIETY *et al.*,
Appellants,
—*vs.*—
MARY PRICE,
Appellee.

No. ~~1047.~~ 709

Appeal from the United States Circuit Court, Southern District of Illinois.

Additional Brief for Appellee,

—BY—

G. KOERNER.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883.

AMERICAN BIBLE SOCIETY *et al.*,
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Appellee.
No. 1047.

Appeal from the United States Circuit Court, Southern District of Illinois.

ADDITIONAL BRIEF AND ARGUMENT OF COUNSEL FOR APPELLEE, MARY PRICE.

The brief of counsel for appellee was prepared and filed for the October Term, 1882, of this Court, when the case having been advanced on the docket, was expected to be submitted for decision. The appellant's counsel filed his abstract and brief only at this term, and I had no opportunity of seeing it before. This is my apology for presenting to the Court some additional remarks.

Counsel for appellee is not aware of any other mode of taking exceptions to a removal, than by a motion made in the Federal Court to *remand*. Such motion is not to be decided on the face of the petition alone. Whether the motion was made in proper time or not, may not appear from the petition itself, but from other parts of the record. Now in this case the motion to remand was made amongst other reasons for the one, that this was the second removal, and that the condition of Rebecca Foreman as to her renunciation was existing in fact, and might have been brought before the Court, when the first motion to remand was before the Federal Court for decision. The fragmentary record from the State Court, showed this fact of a previous removal by implication,

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The second petition and bond was filed on the 20th September, 1880. This at once removed the cause according to the latest theory on the subject. On 21st September, 1880, Rebecca Foreman filed her answer disclaiming her interest. The case being out of the State Court, no issue could be taken on her answer. The case was not dismissed against her, and she is still a party to the record. When petition was filed there was no proof in the record, that she had ever renounced, and even if she had filed her answer before, it would have been liable to be contested by complainant.

The petition alleges the renunciation, but I am not aware that such petitions may be met by counter affidavits, nor is it at all allowable to make allegations like the one made here as to Mrs. Foreman's renunciation in the petition for removal. They are irrelevant and mere surplusage—they are conclusions of law. The relation of the parties must appear by the record, except perhaps as to the statement of citizenship.

It is not contended now that the law of 1875 did repeal the law of 1867, *in toto*, but only as to the time when application shall be made, as that part of the act of 1875 is clearly in contradiction with the act of 1867. It is said, however, it would be useless to provide for a case of prejudice, if application had to be made according to the act of 1875, that is to say, at the term the case could first be tried. I cannot concede that position. The law of 1875 is far more liberal than the original removal act of 1789, when it was necessary to make a motion for removal upon entering the first appearance. This proceeding is in the nature of a change of venue, and there is, I believe, no statute in any of the States, which does not require such a motion to be made at the earliest period, except, perhaps, where the petitioner swears, that the fact of prejudice existing came to his knowledge only just before the making the application.

It is not usual to bring a new case to trial at the commencement of any term. If prejudice exists, it can be found out within a few days. On the other hand, able judges have said, that it would be a very strange practice to permit parties to experiment with their cases, first before the Court in preliminary legal questions, and then, with the jury, as in some States, parties are in all cases, in others, in some cases, entitled to a new trial, as a matter of course. The mischief of delay with motions of that sort, was manifest, and the law of 1875, while not touching the right to have a case removed on account of prejudice, may well have induced the Legislature to limit the time during which such an application was to be made.

The appellant's counsel as to the question of the constitutionality of that part of the act of 1875, which allows an appeal to the party who is opposed to the motion to remand, says the remanding a cause is the end of the case in the Federal Court. That is true, but it is not the end in the State Court, and the point of jurisdiction always remains open there for the State Supreme Court, and from there to this Court. The amount in such a case would not be material. But if the case is not remanded, and the amount involved is not $5,000.00, the party whose case has been removed is helpless. In one case the party may appeal, if the amount involved is ever so small, provided it exceeds $500.00, in the other he has an appeal, provided however the amount exceeds $5,000.00. Where is the equality before the law? When counsel says, that such appeals have been before this Court heretofore, the answer is, that the question now raised was not made and consequently was never passed upon.

As to the question whether the trustees under this will are indispensable parties or not, I rely on what I have said in my first brief, and the authorities there cited. In one position the appellant's counsel is clearly mistaken. He contends that if the will had not named any executor, or if one had been named and declined, the administrator *de bonis non* could have executed the trust. The authorities cited by me, 2 Gilm. 176 *supra*, and 16 Ill., 329 *supra*, expressly negative this position. Nor is there any analogy here to the relation of principal and attorney. If an attorney is intrusted with the sale of land the principal has the estate. The will becomes effective on the death only of the grantor. His estate is gone. In the case he disinherits his heirs at law, they have no estate either, nor have the legatees, unless the estate is devised to them. But the estate must be in somebody. As long as the trustees don't sell and apply the proceeds as directed, the estate is in them. Suppose trespass should be committed, could they not sue, even if they had never been in possession. Certainly the heir at law could not, nor the legatees. It is a well established principle that executors or administrators need only pay taxes accrued before the death of the testator or intestate, and that the heirs at law must pay them. The heirs at law being disinherited they could not pay them. Would not in such a case as this the executors be bound to pay them? In fact whatever the words used, whenever a person is intrusted by a testator with the sale of land at his discretion and to divide the proceeds in a different manner from what the law would, such trustee holds the estate for the time being. The Supreme Court of Illinois has made the distinction, 31 Ill., 369 and 72 Ill, 84, *supra*; when they say that where power to sell land is given and that proceeds should be distributed according to law, this may be a naked power, but otherwise when there is an application of the land or the proceeds differing from that made by law.

In such a case the legatees are really the heirs at law, and hold the land as such subject to be sold as directed by the will. The estate is not *in nubibus* as it would be in a case like the present, unless the trustees had an estate, or a trust and power coupled with an interest.

I may suggest, in conclusion, that the said executors are so far at least pecuniarily interested, as if the will is declared invalid, they will lose their commissions, which under the law of Illinois is three per cent. for any sale of real estate.

It has been decided by many Courts, and also by the Supreme Court of Illinois, that executors are bound to defend a will against all claimants who seek to contest it, and have allowed them reasonable compensation for so doing.

GUSTAVUS KOERNER.

110-61

OFFICE SUPREME COURT U.S.
FILED
FEB 23 1883
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. ~~1047~~. 709

THE AMERICAN BIBLE SOCIETY
ET AL., *Appellant*,
vs.
MARY PRICE, *Appellee*.

APPEAL FROM THE U. S. CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS.

ABSTRACT AND BRIEF,

BY

G. KOERNER,
SOLICITOR FOR MARY PRICE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 1047.

THE AMERICAN BIBLE SOCIETY ET AL., *Appellant*, *vs.* MARY PRICE, *Appellee.*	APPEAL FROM THE U. S. CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS.

Abstract of Appellee, on Motion to Dismiss Appeal.

The original bill in this case was filed to the January Term, 1879, of the St. Clair County Circuit Court, by Mary Price, to set aside the will of Isaac Foreman, deceased, against Rebecca Foreman, widow of Isaac Foreman, deceased, the American Bible Society, the Missionary Society of the Methodist Episcopal Church, devisees under said will, and John J. Thomas, Frederick H. Pieper and Theophilus Harrison, executors of said will.

In said will (see printed Record, page 2) the testator devised to his widow a tract of land for her natural life, and also some personal property, and appoints the aforesaid persons as executors of his last will, and *as trustees for the purposes hereinafter stated.*

He goes on to direct and to empower said executors to sell and convey at private or public sale the whole of the real and personal estate not hereinbefore devised, and to convert the same into money, *giving and bequeathing* to his executors, after payment of debts, the sum of two thousand dollars *in trust* for the use and benefit of his daughter, Mary Price, during her natural life and desires his executors to loan and invest said sum of money and pay to said daughter the interest or profits thereof annually during her life, and after her death the proceeds or interest thereof to be paid annually for the maintenance and education of her child or children; and such principal sum to be paid to her child or children when he, she or they become of age. In case his wife should die, leaving no children, or should all of them die before coming of age, then the said sum of two thousand dollars shall be payable by his said executors: two-thirds thereof to the American Bible Society, and one-third to the Missionary Society of the Methodist Episcopal Church of the United States of America.

The testator then bequeaths the proceeds in money of all the real and personal estate not heretofore specifically devised, as follows: Two-thirds to the American Bible Society, and one-third to the Missionary Society of the Methodist Episcopal Church of the United States of America, to be paid by the executors to the aforesaid societies within a reasonable time after they shall have sold the land and personal property.

After the death of his wife he authorizes his executors to sell and convey the real estate devised to her for life, with as full powers as are granted for the conveyance of his other property, and gives and bequeaths the proceeds of the sale of said lands in like manner and proportion to the societies above named. (Page 3, printed Record.)

The bill alleges that the estate so devised to the said societies is estimated at the sum of $150,000.

The bill then alleged that said Isaac Foreman, at the time of executing said will, was of unsound mind and memory, and asks under the law of Illinois that an issue be made up, whether the said paper produced as a will was the will of said Isaac Foreman or not.

Answers were filed (page 5 of printed Record) by the executors, and the American Bible Society, and the Missionary Society, and by the widow, Rebecca Foreman, denying the allegations of the bill, on the 14th of January, 1879.

There is now a hiatus in the Record. The answers were filed January 14, 1879. The present Record shows no steps taken until September 20, 1880, when the American Bible Society and the Missionary Society of the Methodist Episcopal Church filed their petition for a removal of the cause to the Circuit Court of the United States for the Southern District of Illinois. This hiatus is explained by the certificate of the Clerk of the Circuit Court of St. Clair county to the Record sent up from said Circuit Court (page 10 of the printed Record), where it is certified that the Record is complete, except as to the papers referring to the petition for a removal at a former term in the case of *Mary Price vs. Rebecca Foreman and others.*

We have, therefore, in the case before the court only a fragment of the original Record, which would have shown that at the January Term, 1879, the present petitioners made a motion to remove, which was overruled; that petitioners took the Record to the Circuit Court of the United States for the Southern District of Illinois; that said court, on the 24th of June, 1879, remanded the case to the Circuit Court of St. Clair county; that there was a jury trial September Term, 1879, resulting in a disagreement.

The present Record, however, does show by this certificate of the Clerk, that the petition for removal, which appears on page 6 of printed Record, was the second petition, filed nearly two years after the case was at issue by bill and answer.

This petition sets forth (page 6 of printed Record) that since the filing of the bill the defendant, Rebecca Foreman, widow of Isaac Foreman, the testator, had renounced under the will, and had in lieu of any bequest to her taken her dower in the real and personal estate under the laws of Illinois; that said dower had been allotted to her, and that she had also received her share of the personal property, whereby she ceased to have an interest in or connection with this suit, or the controversy therein involved; that the defendants, Thomas, Pieper and Harrison, had no interest in said controversy, and are only named in said will as executors entrusted with the naked power of sale, and take no beneficial interest in said controversy; that petitioners are citizens of the state of New York; that complainant, Mary Price, is a citizen of Illinois; that amount in controversy is more than five hundred dollars, &c. It contains also the prejudice clause. (See printed Record, page 7.)

This petition was filed on the 20th September, 1880. (Page 6.) The motion to remove was overruled by the Circuit Court of St. Clair county. (Page 10.) On the 21st of September, 1880, there was filed an answer of Rebecca Foreman, alleging that she renounced a dower on 21st May, 1879, and had no interest in the suit. (Page 9.) On the 23d of September, 1880, the fragment of the Record of the St. Clair Circuit Court was filed in the Circuit Court of the United States for the Southern District of Illinois, which court took jurisdiction. A motion to remand was made in that court and overruled at the January Term, 1881, thereof. (Page 11 of Record.) Motion for re-hearing. (Pages 11, 12.) Order of Circuit Court of United States for Southern District of Illinois, former order denying motion for remanding was set aside and order made to remand the case. Appeal prayed by appellants, and allowed, defendants giving a bond, &c. Appeal bond. (Page 13.)

Brief and Argument.

The Record shows that there was a petition for removal once before. It must have been denied, or else there would not have been a second petition. This second petition was filed 20th September 1880. The answer of Rebecca Foreman (P. 9 Record) in which she disclaims interest was filed 21st Sept., 1880. At the time this petition was filed she was still a party to the Record, and had not disclaimed, but stood by her first answer filed January Term 1879, and she is still a party to the Record. No order was made to dismiss the case against her. Her answer could not be denied by complainant, because the motion to remove had been made before the answer came in.

It may be denied yet, and it may turn out that she did not renounce. It is true her renunciation is alleged in the petition, but there was no proof of it in the Record when petition was filed and motion made.

We are moreover not aware that a motion for removal has ever been sustained, after one made before has failed.

If the alleged change in the condition of Rebecca Foreman has occurred as it did, as appears from her answer after the first motion for a removal was made, we believe that such alteration does not avail. We think that the condition of the controversy at the time the petition for removal is filed must control.

McComb vs. R. R., 7 Federal Reports, 426.

It is not quite clear under which law relating to removals this removal has been sought. If under the law of 1875, which its language would indicate, it is not shown in the petition that it was filed at the first term that the cause could have been tried. We think that must be stated in the petition to give the Federal Court jurisdiction. From the fact however that an issue under the law of Illinois is made up by filing bill and answer in a proceeding to set aside a will—Revised Statutes of Illinois 1874, Chapter 148, Section 7—as early as January Term, 1879, and petition for removal was filed September 1880, if any presumption could be allowed to be drawn, it would be, that the cause could have been tried long before September, 1880, no less than five terms having intervened.

Since however the petition contains the prejudice clause, it was probably intended to bring the case under the Act of 1867, which allows motion for removal to be made before a final trial.

We submit whether that clause as to the time of removal has not been repealed by the Act of 1875.

While after some considerable doubt it has now been settled that the law of 1875 does not absolutely repeal all former laws on the subject, but only those parts that are inconsistent with it, and that if former laws embrace causes for removal not embraced in the law of 1875, removals of such causes may still take place by virtue of the former statutes; yet it does not seem to follow that as to the *time of making the application* the law of '75 does not repeal the former laws in this respect.

In the case of *Babbit vs. Clark*, Justice Waite is of a different opinion. See 103, U. S. S. C. Reports, 606.
Murray vs. Holsten, 2 Fed. Rep., 740.
See American Law Register, January, 1881, page 39.

We contend that as to the time of making the application the laws of 1866 and 1867 are repealed. The application must be made at the time indicated in the law of 1875; that is, at the first term the cause could have been tried.

But under neither law could the case have been removed, unless it was conceded that the executors of the will of Isaac Foreman were mere nominal and not necessary parties to the suit.

An examination of the will cannot leave a doubt upon the point.

The first clause of the will (Record, page 6) wills and devises to testator's wife the homestead farm and certain personal property for and during her natural life, at her death to be disposed of as hereinafter mentioned.

By the second clause he appoints three persons, defendants to this suit, as executors of his last will and testament, and as *trustees* for the purposes hereinafter mentioned.

By the third clause he directs and empowers said executors to sell and convey at *public* or *private sale*, and on such terms as they may think best, the whole of his real and personal estate not heretofore devised, and to convert the same into money.

By the fourth he *gives and bequeaths to said executors*, after the payment of all his just dues, the sum of two thousand dollars ($2,000) *in trust* for the use and benefit of his daughter, Mary Price, during her natural life, to be safely invested by them, the interest to be paid annually to her during life, and at her death said interest to be applied to the maintenance and education of her child or children, the principal to be paid to said child or children when they become of age; and should said daughter die without leaving issue, or should all of said issue die before coming of age, the said sum of two thousand dollars shall be payable by his executors: two-thirds thereof to the American Bible Society, and one-third to the Missionary Society of the Methodist Episcopal Church of the United States of America.

By the fifth he gives and bequeaths the proceeds in money of all real and personal estate not heretofore specially devised, to be paid within a reasonable time by the executors to the before mentioned societies in the proportion in the fourth clause mentioned, within a reasonable time after they shall have sold land or personal estate.

The last clause makes a similar provision in regard to the land devised to his wife for life after her death.

It will not be questioned, and has not been, both in the State and Federal Court, that if the land had been given, bequeathed or devised to the executors, in trust, to be sold for the purposes mentioned, the executors would have been indispensable and necessary parties, not nominal ones.

The fourth clause does give and bequeath the sum of two thousand dollars to said executors' in~~terest~~, and of course makes them the legal owners of the bequest, subject to a trust. This seems to show the intention of the testator, and although the same language is not employed in the preceding clause, it is very clear that the testator did not mean to make any difference. But be this as it may, we contend that the power given to the executors in this will is not a mere naked power, but one coupled with an interest; and if this be true, the law is beyond question that they are indispensable parties, and that they, being residents of Illinois, the non-citizen defendants cannot remove the case to the federal courts.

Trust

We refer as to the general doctrine as to naked power and power coupled with an interest to—

Story's Equity Jurisprudence, Vol. II., pages 1058 and 1061.
Perry on Trusts, § 305.

This court has passed upon this point in several cases. See
11 Wallace, 172, *Coal Co. vs. Blatchford.*
20 Wallace, 123, *Knapp vs. R. R. Co.*

Speaking of trustees for bondholders, the court say: "They are the real plaintiffs in any suit brought to enforce a claim accruing to them in the execution of their ~~trial~~ Trust, as much so as *executors or administrators* are, who also sue for the benefit of others and not for themselves. Like them, they control the litigation, and are charged with the responsibility of conducting it."

103 U. S. Supreme Court, page 336, *Blake vs. McKinn*, is also directly in point.

See also Ex parte Grimbal, decided February, 1878, in the Supreme Court of Alabama, 61 Ala., 592.

Broadway National Bank vs. Andrews et al., decided by the Supreme Court of Massachusetts, January, 1881, 130 Mass., 431.

In that case, the defendant, Pierce, was trustee under a will, holding a certain sum of money in trust to invest the same in such manner as he deems prudent, and to pay the net income to testator's brother, Charles W. Adams, the other defendant, during his natural life, and at his death to pay the said income to his present wife, &c. Adams was sued by plaintiff for $10,000, who is a citizen of Massachusetts, Pierce, the trustee, also, and Adams a citizen of Texas. The bill prayed that the plaintiff may be allowed to reach and apply that interest in payment of its debt, &c. Both defendants petitioned to remove the case to the Circuit Court of the United States. Motion denied, because the controversy between the creditor and debtor cannot be fully determined, without the presence of the trustee, that said trustee is not merely a formal but a necessary party; and the trustee, being a citizen of the same state with plaintiff, neither the debtor alone, nor the debtor and trustee, jointly, can remove the case.

This opinion was delivered by C. J. Gray, and is exactly in point, though the case is not quite as strong as the present case; the trustees do not even join in the petition of removal.

As to the question that the trustees in this case are not invested with a naked power merely, but with a power coupled with a trust, we rely, amongst others, on the following authorities of the state of Illinois:

2 Gilm., page 176, *Hall vs. Irwin and others.*

In that case the court decided that in a case where an executor had been authorized to sell land, and convert proceeds into money for his children no executor being named an administrator with the will annexed could not sell, because the executor under the will was not merely an executor, but a trustee, whose trust could not be delegated.

16 Ill., page 329, *Clinfelder vs. Ayers.*

The court hold that when a power is given to sell land, and that proceeds should be distributed according to law, this might be a naked power, but when there is an application of the land or their proceeds differing from that made by law, according to the true and sound distinction, gathered from the currents of authority, the power is coupled with an interest or a trust.

31 Ill., 369, *Wardwell vs. McDowell.*
72 Ill., 84, *Hughes vs. Washington et al.*

In this case the court's decision is as follows:

"Under a will authorizing the executor to sell property in such a manner, and on such terms, and for such prices, as to him may seem best for the interest of the children of the testator, and to reinvest the proceeds from such sale in such other property as he may think best; the executor has an absolute discretionary power of sale, as *a trustee*, in the same manner as he would have had held the title, if it had been specifically devised to him."

To the same effect is

74 Ill., 147, *Whitman vs. Fischer.*

It is a general rule that both trustee and *cestui que trust* must be made parties. 96 Ill , 196.

We also submit the following suggestion:

The Constitution gives the Supreme Court original jurisdiction in certain specified cases, and appellate jurisdiction in all other cases heretofore mentioned in the constitution, both as law and fact, with such exceptions, and under such regulations as Congress shall make. Article III., Section 2.

Appellate jurisdiction is a technical term. It means an appeal from a final judgment, and the judiciary act relating to appeals and writs of error, provides in every instance that they may be taken from final judgments only. Revised Statutes U. S., Sections 691, 692, 693, 695, 696, 699, 702, 709.

The uniform decisions of this court have kept the line between final and interlocutory judgments very strictly, and have declined appellate jurisdiction in all cases which were not strictly final.

Gibbons vs. Ogden, 6 Wheat., 448.
Brown vs. Swain, 9 Peters, 1.
Pepper vs. Dunlap, 5 How., 51.
Beebe vs. Russell, 19 How , 283.

An appeal in the sense now used was unknown to the common law. Appeals in chancery cases were borrowed from the civil law; they were only allowed on judgments which were final, or became so after the expiration of a certain time (time for appeals). There were a few exceptions, as where, for instance, before final judgment, possession had been given to one or the other party. The doctrine of the common law was, that whenever the final judgment of the court is obtained, if either party was disatisfied with it, the record may be removed by writ of error into the Superior tribunal, in order to the reversal or affirmance of judgment.

Sellon's Practice, Vol. II., page 483.
Bacon's Abridgment, *Voce: Error*, A. 2.

The Constitution must have taken the word "appellate" as defined by the common law.

The words "with such exceptions and regulations as Congress shall make" are not to be understood so as to affect the nature of appellate jurisdiction. As far as regulations are concerned, it of course required legislation as to the manner of appealing, the restriction as to amount involved, &c.; as to exceptions, it means that in certain cases appeals might be vested in inferior tribunals. Chancellor Kent seems so to understand it when he says:

"Congress might create a succession of inferior tribunals; in each it might vest appellate as well as original jurisdiction. Appellate jurisdiction of the Supreme Court, in cases where it had not original jurisdiction, was declared to be subject to such exceptions and regulations as Congress might prescribe. It remained, therefore, entirely in the discretion of Congress to cause the judicial power to be exercised in every variety of form of *appellate* jurisdiction, and the appellate power was not limited to cases pending in the courts of the United States."

II. Kent Com., p. 319.

We express therefore, we think, a well grounded doubt whether that clause of the law of March 3, 1875, concerning removals, which allows appeals from an interlocutory order, complies with the Constitution. But for another reason we feel almost confident that the clause is unconstitutional. It allows an appeal but to one of the parties litigant.

That all persons should be equal before the law, is a principle though often violated by arbitrary governments, older than Magna Charta and our Constitution. It is one requiring no express constitutional sanction. If there was one, it would be like most of the clauses of Magna Charta or the Bill of Rights in our Constitution, merely declaratory of what the law was.

The first section of the 14th Amendment to the Federal Constitution enjoins upon the states not to deny to any person within its jurisdiction the *equal* protection of the laws.

It would be unreasonable to suppose that our Federal

Constitution should lay a duty on the legislative powers of the states composing the Union which could be disregarded by the Federal Legislature.

This clause of the law of 1875 places one of the party at a great disadvantage. To remove a case to the United States Circuit Court, it sufficies as one of the prerequisites that the amount in controversy is over five hundred dollars. To take a case from the United States Circuit Court to the Supreme Court the amount must be over five thousand dollars. Suppose a case is removed to the Circuit Court involving only four thousand five hundred dollars, and a motion to remand is overruled. If the party which has made the motion is unsuccessful in the Circuit Court, there is an end of it. He can never have the question of jurisdiction decided by a higher court. But his adversary, if motion to remand is allowed, has a right to have that question submitted to the highest tribunal, without any limitation to the amount in controversy. In a case involving but five hundred dollars, one party may take his victim to the Supreme Court, taxing him with heavy costs, while if the decision is against remanding, the party having made the motion must abide by the decision of very often but one District Judge, however erroneous such decision may be, and must try his case in the Federal Court without a right to appeal.

The principle contended for, has been applied in a late decision by the Supreme Court of Rhode Island in the case of *State vs. Kartz*, Chicago Legal News, Vol. 15, No. 7—will be in Vol. 13 of Rhode Island Reports. A statute of that state provides, that persons who shall keep a place in which it *is reputed* that intoxicating liquors are sold without license, shall be fined or imprisoned, or both. The court decided the law to be unconstitutional. It says: "The question is, can a man be constitutionally fined or imprisoned for keeping a place which has the reputation of being used for the illegal sale of intoxicating liquors, simply because it has the reputation. If he can, then it follows that without any criminal misconduct, he can be punished, because others, over whom he has no control, impute such conduct to him or believe it of him. We are of the opinion that any law which is justly obnoxious to such a characterization is so repugnant to the fundamental rules of our jurisprudence, and so utterly at variance with the general spirit and principles of the Constitution in regard to the rights of property and personal freedom, that it must be held to be unconstitutional, even though no particular provision can be pointed out, the literal terms of which it violates."

This decision we think is applicable to the clause in question, and seems to us to deserve universal approbation.

All of which is respectfully submitted.

GUSTAVUS KOERNER,
For Mary Price, Appellee.

110-61

Office Supreme Court
FILED
DEC 31
JAMES H. McKENNEY

Supreme Court of the United States

October Term, 1883.

AMERICAN BIBLE SOCIETY
ET AL.,
Appellants,
vs.
MARY PRICE,
Respondent.
No. 709.

SUPPLEMENTAL BRIEF FOR APPELLANTS BY GEO. P. STRONG.

In the case of John B. Gibson, appellant, *vs.* Charlotte Bruce, recently decided by this Court, I find a construction of the act of March, 1875, in reference to the removal of causes somewhat different from that given in the Circuit Courts, and referred to in my Brief, pages 5 and 6. The conclusion reached is, "That a suit cannot be removed from a State court *under the Act of 1875*, unless the requisite citizenship of the parties exists both when the suit was begun and when the petition for removal was filed."

The case was clearly not removable under any clause of the Act of 1875, nor under any construction of that Act heretofore given. The petition was not filed until nearly two years after the commencement of the suit, and at the time it was filed both parties were citizens of the same State.

It is respectfully submitted that this decision does not affect nor seem to embrace the case at bar.

Mrs. Price, the complainant, was and still is a citizen of Illinois, in which the suit was brought, and the residuary legatees, the petitioners for removal, were citizens of New York, both when the suit was commenced and also when the petition for removal was filed.

The removal is sought, not under the Act of 1875, but under the Act of 1867, and not primarily on the ground of citizenship in different States, but on the ground of prejudice and local influence against petitioners.

The Act of 1867 allows a removal in cases "in which there is *a controversy* between a citizen of the State in which the suit is brought and a citizen of another State," on the petition of the latter, "*filed at any time before the trial or final hearing of the suit*," upon filing an affidavit of prejudice and local influence, etc.

The reasoning in the case of Gibson *vs.* Bruce, does not seem to apply in the case at bar.

No right of removal is given on account of citizenship alone, by the Act of 1867. Although the appropriate citizenship of certain parties must exist, the right of removal rests solely upon the existence of prejudice, etc.

In the case at bar, the relation of Mrs. Rebecca Foreman was uncertain, conditional, it might perhaps be called. By the terms of the will, she was made a legatee. It was therefore, proper that complainant should make her a party to her bill. But the statutes of Illinois made a different provision for her, and she was at liberty to elect the one or the other, at any time within a year from the date of letters testamentary.

The statutes of Illinois have abolished tenancy by the curtesy, and endow husband and wife, surviving, in the same manner. Section 9 makes a jointure in certain cases, subject to election, a bar to dower.

Section 10 is as follows: "Any devise of land, or any estate therein, or any other provision made by the will of a deceased husband or wife, for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to, and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower, in the lands, and to one-third of the personal estate, after the payment of all debts."

Section 11 provides that "any one entitled to an election, under either of the two preceding sections, shall be deemed to have elected to take such jointure, devise, or other provision, unless within one year after letters testamentary, or of administration are issued, he or she shall deliver or transmit to the county court of the proper county, a written renunciation of such jointure, devise, or other provision."

Section 13 gives the form of renunciation, and then provides that "the renunciation shall be filed in the office of the clerk of the county court, and entered by said clerk at large upon the records of the court, and shall operate as a complete bar to any claim which such survivor may afterwards set up to any jointure, devise, testamentary provision, or dower, thus renounced."

Rev. Stat. Ills., 1874, §§ 1, 9, 10, 11, 13, pages 423-4-5.

Mrs. Foreman filed her renunciation, as prescribed by the statute, May 11, 1879, six months after the grant of letters testamentary. This act related back to the death of her husband, and settled the fact that her title to any portion of his estate was based upon the statute and not upon the will. She takes exactly as she would, if her husband had died intestate.

If complainant had filed her bill after this election, Mrs. Foreman would not have been either a necessary or a proper party, not having any interest in the subject-matter of the controversy.

Such was the condition of this case when this petition for removal was filed. The bill might have been dismissed, as to her, at any time after she had made her election. If she had never filed a supplemental bill disclaiming any interest in the suit, it would have made no difference, unless in the matter of costs. Upon the final hearing, it would not have affected any interest she had in the property. Whether the will was sustained, or set aside, she could only take under the statute.

There has therefore been no real change in the interest of any party to the suit. It was the same when the petition for removal was filed that it was when the suit was commenced.

The parties substantially interested at the time the suit was commenced and also when the petition for removal was filed, are Mrs. Price, complainant, on the one side, and the two societies on the other, and they are, and always have been citizens of different States.

In this feature it differs essentially from the case of Gibson and Bruce, where parties really interested, and on different sides of the controversy, indeed all parties to the controversy, were citizens of the same State. At no time has there been a change of citizenship, nor has there ever been any actual change of title in Mrs. Foreman. By electing under the statute, she shows that she never was actually interested in the controversy, and could not be affected by the result of the issue, will or no will. She simply possessed a right to become interested. If the will is sustained, Mrs. Price takes a life estate in the two thousand dollars, and the two societies take the residue. If it is not sustained, Mrs. Price takes the whole estate, as heir at law, except what her mother has already taken, and the Societies take nothing.

There is, therefore, and has been ever since this suit was brought, a controversy between Mary Price, a citizen of Illinois, and the two Societies, citizens of New York, and no other parties.

Again, by the Act of 1867, the time for exercising the right of removal is materially different from that prescribed by the Act of 1875. In the former, the cause may be removed at any time "before the trial, or final hearing." In the latter, it can only be removed by filing the petition at or before the term at which the cause could first be heard The reason for the difference is clear, and is concisely stated in the opinion of this Court by Justice Field in the case heretofore cited, Railway Co. *vs.* Whitten's administrator, 13 Wall., 270, in which the same objections to the Act of 1867, were urged as are urged by counsel for respondent in this case.

The Court says: "If Congress has subsequently become satisfied that when a plaintiff discovers, after suit brought in a State court, that the prejudice and local influence, against which the Constitution intended to guard, are such as are likely to prevent him from obtaining justice, he ought to be permitted to remove his case into a National court. It is not perceived that any constitutional objection exists to its authorizing the removal, and of course, to prescribe the conditions upon which the removal shall be allowed." It follows, says the Court, that the objection to the jurisdiction of the Circuit Court upon the grounds advanced by the defendant, cannot be maintained, op p. 290.

The question of the right to appeal from an order remanding a cause, has been distinctly decided in the case of Ayers *vs.* Chicago, 101 U. S., 185, op. 186-7. In giving the opinion of the Supreme Court, Chief Justice Waite says, in reference to the appeal from an order remanding the cause: " After the appeal was docketed the city moved to dismiss, because the order remanding the cause was not one from which an appeal is allowed, and because the order was not on the merits of the cause, nor a final order, judgment or decree, from which an appeal lies." " There is no doubt of our jurisdiction." Then citing Section 5, of the Act of 1875, (18 Stat. part 3, 472) the Court proceeds: " The order appealed from in this case comes directly within the last clause of this section. It follows that the motion to dismiss must be overruled."

Respondent makes the same objection in the case at bar.

As to respondent's objection growing out of any former attempt to remove this cause, there is nothing in the record showing that anything more than a petition to remove said cause was ever before filed, and this is only alluded to by the clerk of the State Court, in his certificate (page 10 of record). Whether an attempt to remove the cause before Mrs. Foreman renounced was made or not, could not affect the right of removal now. The question in the former case could not be the same as that now involved. If made before Mrs. Foreman's relation to the controversy had been settled by her election to take under the statute, it must necessarily have failed. But the facts of the case are not before this court. They could have been brought before the Circuit Court by a writ of certiorari, to bring up a complete record, if there was really any diminution of the record, and no doubt they would have been brought up, if they would have availed to defeat this application for removal.

Frazer *vs.* Jennison, 106 U. S., p. 191.

It is not denied, and cannot be, that this is the first and only petition for removal that has been filed, since Mrs. Foreman made her election, and filed her renunciation of all provisions under the will.

(I find an error in my citation of this case in my Brief, p. 12, cited as Frazer *vs.* Johnson. It was there stated that the legatees propounded the will. I find on further examination it was the executors who propounded the will.)

As to the interest of executors, I will add to what I have before said, that it does not seem to be the intent of Congress that in construing the Act of 1867, the theoretical or technical relation of executors or others to the suit in which the controversy arises, shall control the right of removal. The language would imply that they looked beyond this to see where the *real interest* lay, which might be affected by prejudice or local influence.

This principle of construction seems to have been recognized by this Court in the cases before referred to, particularly in the case of Hewitt *vs.* Phelps, 105 U. S. Rep., 393, cited at page 19 of Brief. Also in the cases of Brown *vs.* Strode, 5 Cranch, 303, where suit was on an official bond payable to the Justices of the Peace of the county, and in McNutt *vs.* Bland, 2 How., 10, a suit on a sheriff's bond given to the Governor of the State. These cases are commented on and approved by this Court in the case of Coal Co. *vs.* Blatchford, 11 Wall., 172.

The language of the Court is cited, showing the principle on which the case had been decided to be that, "where the real and only controversy is between citizens of different States, * * and the plaintiff is by some public law, compelled to use the name of some public officer who has not or ever had any interest in, or control over it, the courts will not consider any others as parties to the suit than the persons between whom the litigation before them exists.

Again he says: "The Justices of the Peace in the one case, and the Governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved."

So it is with the executors. They are mere custodians of the estate, gathering it together and turning it over to the parties entitled, retaining nothing for themselves.

Counsel for respondent attempts to show an interest, by stating the fact that they are entitled to commissions. This I submit, is nothing but compensation for services, and in no sense an *interest* in the estate.

In Miller *vs.* Whittaker, 23 Ills., 453, the Supreme Court of Illinois did not consider Miller, the party to whom the deeds for land were made, and who held the notes, as the real substantial party, but required the party for whose use and benefit he held them, to be made a party to the bill. So in Hewitt *vs.* Phelps, Pearce's legal estate, counted as nothing, in determining who were the real parties in the controversy. If this is the relation of parties in these various cases to which I have alluded, is it not much more true in a proceeding like that in the case at bar, where the only question to be determined is, who are the real parties to the controversy, whose interests are to be affected by it. In settling that question, the Act of 1867, in providing that "when a suit is now pending," etc., *in which there is a controversy between a citizen* of the State in which the suit is brought and a citizen of another State," etc., does not have regard to the formal or technical issue created by the pleadings, but to the real and substantial interests that are to be affected by the "*controversy.*"

It is the citizenship of these parties which ought to determine the right of removal. I respectfully submit that only by such a construction can the benefits of a removal where prejudice and undue influence exist, evidently intended by the National Legislature, be fully secured.

Additional strength is given to this position by the fact that the time for exercising the right of removal under the Act of 1867, is materially different from that prescribed by the Act of 1875. The reason for the difference is clear The existence of prejudice may not be known to the non-resident parties, at the commencement of the suit.

Indeed, it is most usually developed during or after a trial. It would hardly be possible that it should be know before, or even that it should exist, until the facts were made public by a trial or an attempted trial. Hence the Act of 1867 allows a removal on a petition filed at any time before the "trial or final hearing." It was evidently the intent of Congress to give the parties having the substantial interests, those that might be injuriously affected by prejudice, time to ascertain whether or not it existed.

There is no reason for any such delay in any other case. The citizenship of the parties is always known at the commencement of the suit.

The right of removal is claimed in this case, not because of change of citizenship of any party to the suit, but because by the election of Mrs. Foreman, it has now been made to appear that the real parties to the controversy possessed the requisite citizenship both at the commencement of the suit and at the time of filing the petition for removal, and by filing an affidavit of prejudice and local influence, they have brought themselves within the terms of the Act of 1867. I respectfully submit therefore, that in this case, and under the Act of 1867, a different rule of construction should be adopted from that laid down in reference to the Act of 1875, in Gibson *vs.* Brûce.

GEO. P. STRONG,
Of Counsel for Petitioners.

110-61

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 1047.

THE AMERICAN BIBLE SOCIETY ET AL., *Appellant,* *vs.* MARY PRICE, *Appellee.*	APPEAL FROM THE U. S. CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS.

And now comes G. Koerner, Solicitor for Mary Price, and moves the court to dismiss the appeal in this case, for the reason that the Federal Courts have no jurisdiction, and because no appeal lies from the order made by Circuit Court in this case.

Respectfully submitted.

G. KOERNER.